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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 635

NATIONAL BUS TRAFFIC ASSOCIATION, INC., ET AL.,
Appellants,

v.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal From the United States District Court For the Northern District of Illinois, Eastern Division

REPLY TO MOTION TO AFFIRM

NATIONAL BUS TRAFFIC ASSOCIATION, INC.
GREYHOUND LINES, INC.
TRANSCONTINENTAL BUS SYSTEM, INC.
DELUXE TRAILWAYS, INC.

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Date: December 23, 1965

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REPLY TO MOTION TO AFFIRM

In their motion to affirm, Appellees do not deny that the Commission decision substantially broadens the scope of the partial exemption of Section 203(b)(1) of the Interstate Commerce Act, 49 U.S.C. Sec. 303 (b)(1). Rather, the motion to affirm acknowledges that the Commission has adopted "a broader construction of the exemption provision." (p. 5). The only

justification made for this departure from the prior Commission holdings is "the Commission's practical experience with this subject," but Appellees admit that this is the first case in which the entire Commission has considered the problem. (p. 6)

The Commission's decision is not entitled to deference by the courts. The citation of *Levinson* v. *Spector Motor Company,* 330 U.S. 649 (1946), is inapposite for two reasons. First, in *Levinson,* the Commission did not depart from its own prior interpretation of the Act, which it is admittedly doing here. Second, the deference given to agency interpretation in the *Levinson* case was based on the agency's "long record of practical experience with this subject and its responsibility for the administration and enforcement of this law . . . ." (330 U.S. at 672) Here, the Commission did not base its conclusion on a long record of practical experience; indeed, its practical experience in this field had, prior to the instant decision, dictated a contrary conclusion.

The decision of the Commission (former Division 5) in *Van Galder Common Carrier Application,* 53 M.C.C. 816 (1951) (not printed in full, but reproduced in J.S. Appendix E), held that the transportation of school groups in interstate commerce on trips similar to those involved in the instant proceeding did not come within the partial exemption. This is the only Commission decision discussing the partial exemption in any detail, and represents the Commission's "practical experience" with this problem. When an agency does not rest its conclusion on matters within its own special competence, the principle of deference to agency construction is not applicable but the courts may determine what the governing principle is. *Federal Com-*

munications Commission v. *RCA Communications,* 346 U.S. 86, 91 (1963); *Texas Gas Trans. Corp.* v. *Shell Oil Co.,* 363 U.S. 263, 270 (1960); *Hess* v. *Esperdy,* 234 F. Supp. 909, 911 (S.D.N.Y. 1964). Likewise, a new agency interpretation which is antagonistic to a long-continued construction "is entitled to no weight as an administrative determination." *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States,* 209 F. Supp. 35, 41-42 (N.D. Ill. 1962).

In *United States* v. *Leslie Salt Co.,* 350 U.S. 383, 396 (1956), this Court quoted with approval Mr. Justice Cardozo's statement in *Norwegian Nitrogen Prod. Co.* v. *United States,* 288 U.S. 294, 315 (1933), that "administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful." The narrow construction of the school exemption has been followed by the Commission since its first consideration of the partial exemption in 1938 in *Motor Carrier Safety Regulations—Exemptions,* 10 M.C.C. 533. (J.S. 13-14) The Commission's assumption, without any supporting evidence, that "schooling today encompasses an area broader than mere classroom instruction" (J.S. 5a), is not a cogent reason such as *Leslie* and *Norwegian Nitrogen* contemplate. Nor can the Commission's word play with the term "school" (J.S. 4a-5a) make indefinite or doubtful statutory language which is clear on its face.

Appellees' argument on the impact of the Commission's ruling based on the scope of Keller's original application for authority (p. 6) fails to recognize that, unless reversed, the decision will stand as a precedent for future application of the partial exemption. Appellees do not deny that the ruling broadens the

partial exemption to embrace activities only remotely connected with conventional classroom study. (J.S. 18-19) In view of the admitted broadening of the statutory exemption from economic regulation, Appellees should not be heard to argue that no substantial question is involved because Keller was given much more than he bargained for.

The clear admission that the Commission has broadened the school bus exemption (p. 5) demonstrates the substantially of the question involved. The Interstate Commerce Act is remedial legislation and must be liberally construed in order to effect its evident purpose. It is well-settled that exceptions from its reach are to be strictly construed.[1] In *McDonald* v. *Thompson*, 305 U.S. at p. 266, this Court made clear that exceptions to Part II of the Act are not to be broadened by interpretation:

> " . . . As the Act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms . . . ."

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[1] *McDonald* v. *Thompson*, 305 U.S. 263 (1939); *Piedmont & N.R. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299 (1932); *Interstate Commerce Commission* v. *Teeter*, 228 F. Supp. 479 (D. Ga. 1964); *Interstate Commerce Commission* v. *Interstate Auto Shippers, Inc.*, 214 F. Supp. 473 (S.D. N.Y. 1963); *B & C Truck Leasing, Inc.* v. *Interstate Commerce Commission*, 283 F. 2d 163 (10th Cir. 1960); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (10th Cir. 1958); *United States* v. *LaTuff Transfer Service*, 95 F. Supp. 375 (D. Minn. 1950); *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873 (D. Tenn. 1950) aff'd 188 F. 2d 367, cert. den. 342 U.S. 827; *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn. 1948).

The decision of the Commission here is contrary to this well-established rule since it admittedly enlarges an exemption from the regulatory control contemplated in the statute.

Although the interpretation of the exemption was a matter of first impression before the entire Commission and thereby before the three-judge Court, on review the Court did no more than adopt the findings and conclusions of the agency. Where a question of law is involved, a judicial rubber-stamping of agency action is not the adequate review of the administrative process which the courts are intended to afford. Where the agency's rationale is directly assailed, the basis for the judicial approval thereof cannot be ascertained from a bare adoption of the agency's statement.

For the reasons stated, Appellants respectfully request the Court to deny the motion to affirm and give plenary consideration with briefs and oral argument.

Respectfully submitted,

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